

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REZA TATUM,

Defendant-Appellant.

UNPUBLISHED

October 4, 2007

No. 272249

Wayne Circuit Court

LC No. 06-003383-01

Before: Bandstra, P.J. and Talbot and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree home invasion, MCL 750.110a(3), and was sentenced to 36 months of probation with the first 12 months to be served in jail. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arises from an incident in which he entered the home of the complainant with whom he had formerly been involved in a sexual relationship. Andrea Evans, a neighbor who lived across the street, observed defendant looking around outside the home and then entering through a side door. India Clark, who was visiting at a neighbor's home, observed defendant in the house and leaving through a back window. The complainant later discovered that items and cash were missing from her home. She denied giving defendant a key or permission to enter the home.

Defendant first argues that his constitutional rights were violated because the trial court insisted that he appear before the jury in jail attire. However, the record does not factually support defendant's claim. After defense counsel brought to the court's attention that defendant was wearing a green shirt that said "Wayne County Jail" on the back, he was given another shirt that covered the first completely. The court noted that defendant was completely dressed in civilian clothes. Defense counsel did not dispute this point. This occurred before the jury venire entered the courtroom. Therefore, this issue is without merit.

Defendant also argues that he was denied the effective assistance of counsel because trial counsel stated that he was not prepared and repeatedly asked the court to have another lawyer appointed to represent defendant.

Because defendant did not move for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, a defendant must show that his counsel's representation "fell below an objective standard of reasonableness" *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant "must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Id.* Defendant must also demonstrate that counsel's deficient performance "was so prejudicial to him that he was denied a fair trial." *Id.* He must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" *Id.*, at 302-303 (citations and internal quotation marks omitted).

Defendant has not established that he was denied the effective assistance of counsel. "When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Defendant has not shown that he was prejudiced by the alleged lack of preparation. Although defendant asserts that counsel did not subpoena witnesses for the defense, he does not identify any witnesses or indicate how their testimony would have been beneficial. He also claims that counsel was ineffective for failing to make an opening statement, but there was no reason to give an opening statement once the defense had determined not to call any witnesses or present any evidence. Moreover, an opening statement would not have changed the outcome of the proceeding. Defendant also notes that there were contentious exchanges between the court and trial counsel during the cross-examination of the complainant. Having reviewed these exchanges, we are not persuaded that counsel's performance denied defendant a fair trial.

Lastly, defendant contends that the trial court erred in failing to rule on defendant's objection to the scoring of offense variable 13 and that counsel was ineffective for failing to insist on a ruling. The prosecution concedes that the trial court should have ruled on defendant's objection and that this offense variable was incorrectly scored. However, resentencing is not required because defendant was sentenced to probation and has since been discharged from his probation, rendering this issue moot. See *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

We affirm.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood